

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 2000 Session

ELIZABETH ANN (TIEDE) CROLEY v. THOMAS KENT TIEDE

Appeal from the Chancery Court for Montgomery County
No. 91-67-423 Carol Catalano, Chancellor

No. M1999-00649-COA-R3-CV - Filed October 5, 2000

This post-divorce case presents the single controlling question of how to calculate an ex-wife's interest in an ex-husband's pension under the deferred distribution method where the retirement plan formula for distribution gives added weight to post-divorce, pre-retirement months or years. Without elaboration, the trial court adopted the "time rule" formula, treating post-divorce pension benefit enhancements earned by a husband's continued post-divorce employment under the retirement system as applicable to the non-employee spouse share at retirement. For reasons stated herein, we affirm the action of the trial court.

Tenn. R. App. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed.

WILLIAM B. CAIN, J., delivered the opinion of the court, in which BEN H. CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Denty Cheatham, Nashville, Tennessee, for the appellant, Thomas Kent Tiede.

Mark A. Rassas and Julia P. North, Clarksville, Tennessee, for the appellee,
Elizabeth Ann (Tiede) Croley.

OPINION

Elizabeth Ann Tiede, now Croley, ("the Wife") and Thomas Kent Tiede ("the Husband") were married June 16, 1963. The parties separated in September 1989 and were divorced on grounds of irreconcilable differences on December 18, 1992 by decree adopting their Marital Dissolution Agreement ("MDA"). Section 3 of the MDA provided:

The Husband shall pay to the Wife, 50% of his retirement benefits, based on 23 years of employment, such to be paid by direct wage assignment or allotment if available. Such benefits are to commence by February 1, 1999, or no earlier than 36 months from the entry of final decree in this cause if the Husband is involuntarily retired by AAFES. In addition, the Husband shall take immediate steps, other than financial expenditures, to make the Wife beneficiary of at least 50% of his AAFES retirement

benefits, if he dies prior to his eligibility for such benefits. If income taxes are withheld from the total amount of the Husband's retirement resulting in a higher withholding from the Wife's one-half interest than if she was taxed at her own rate, the Husband shall pay to the Wife the difference.

The Husband retired in July 1996 and began receiving retirement benefits as of August 1, 1996. At the time of his retirement, the Husband had 28.863 years of employment with the Army and Air Force Exchange Service, the first 23 years of such service having occurred during the marriage of the parties and the remaining 5.863 years occurring after the divorce.

The parties do not dispute that the formula used, pursuant to the Marital Dissolution Agreement and controlling Tennessee law in *Cohen v. Cohen*, 937 S.W.2d 823, 831 (Tenn. 1996), is the correct formula. The numerator is 23 representing the number of years the parties were married while the Husband was under the retirement system. The denominator is 28.863 representing the number of years, marital and non-marital, that the Husband earned retirement benefits prior to his retirement. When the numerator is divided by the denominator, the result is that 79.687 percent of the Husband's total service in the retirement system equals the 23 years of service during the marriage. Under the 50 percent allocation of the MDA, "based on 23 years of employment," the Wife is entitled to 39.84 percent of the Husband's retirement benefits (79.687 percent times 50 percent equals 39.84 percent).

Where the parties differ is in the application of this percentage. The Husband's retirement benefits under the retirement plan are based on his annual income during his three highest paid years. His highest paid pre-divorce years were 1989 through 1992 with an average yearly income of \$57,799.00. His highest three years salary prior to his retirement were the years 1993 through 1996 when his average income was \$80,010.00 per annum. The Wife claims that she is entitled to 39.84 percent of the Husband's retirement actually drawn beginning August 1, 1996 based upon his average salary for the last three years prior to his retirement (\$80,010.00). The Husband insists that the Wife is only entitled to 39.84 percent of what his retirement benefit would be based upon his average salary for the last three years of the marriage (\$57,799.00).

The trial court held that section 3 of the MDA was unambiguous and that the Wife was entitled to 39.84 percent of the Husband's full retirement actually drawn by him subsequent to August 1, 1996. After this finding by the trial court, the Husband filed a motion to alter or amend claiming that the provision was ambiguous and seeking to introduce parol evidence to explain the alleged ambiguity. The trial court refused to allow parol evidence at the hearing on the motion to alter or amend but did allow the Husband to make a tender of proof of all of the parol evidence he wished to introduce. Thus, the record before this court is complete and if the chancellor is in error as to ambiguity in the controlling language of the MDA, we have before us for *de novo* review, all of the parol evidence which the Husband sought to introduce.

With the "increasingly prominent role" that pension rights are playing in divorce proceedings, the division of such benefits is not a new subject to our courts. *Kendrick v. Kendrick*, 902 S.W.2d

918, 920 (Tenn. Ct. App. 1994); *see, e.g., Cohen v. Cohen*, 937 S.W.2d 823 (Tenn. 1996); *Umstot v. Umstot*, 968 S.W.2d 819 (Tenn. Ct. App. 1997); *Oaks v. Oaks*, No. 01-A-01-9901-CH-00046, 1999 WL 734498 (Tenn. Ct. App. Sept. 22, 1999). In *Kendrick*, this Court first discussed “whether nonvested pension rights are marital property” and “the manner in which [such] pension rights should be valued and distributed if [they] are marital property.” *Kendrick*, 902 S.W.2d at 921. The *Kendrick* court concluded that nonvested pension rights accruing during a marriage are marital property subject to equitable division in divorce cases. *Id.* at 924. With regard to the valuation and distribution of pension rights, the court discussed both the present value method¹ and the retained jurisdiction or deferred distribution method. *Id.* at 927.

The court stated that “[t]he retained jurisdiction method . . . requires the court to retain jurisdiction over the case and to defer dividing the pension interest until the pension vests² or matures³. In some jurisdictions, the courts using this method determine the nonemployee spouse’s share in advance and then enter an order identifying the portion that the spouse will receive if and when the employee spouse begins drawing his or her retirement benefits. The nonemployee spouse’s share is commonly expressed as a fraction or a percent of the employee spouse’s monthly pension benefit.” *Id.* at 927. “The numerator of the fraction is the number of years or months of the marriage during which the pension interests accrued, and the denominator is the total number of years or months during which the pension benefits were accumulated before being paid.” *Id.* at 930 n.17.

The parties in *Kendrick*, Sergeant Kendrick and Ms. Kendrick, had married in 1981, after Sergeant Kendrick had already begun his military career, and they separated in September of 1991.

¹The present cash value method “requires the trial court to place a present value on the retirement benefit as of the date of the final decree. To determine the present cash value, the anticipated number of months the employee spouse will collect the benefits (based on life expectancy) is multiplied by the current retirement benefit payable under the plan. This gross benefit figure is then discounted to present value allowing for various factors such as mortality, interest, inflation, and any applicable taxes. Once the present cash value is calculated, the court may award the retirement benefits to the employee-spouse and offset that award by distributing to the other spouse some portion of the marital estate that is equivalent to the spouse’s share of the retirement interest. The present cash value method is preferable if the employee-spouse’s retirement benefits can be accurately valued, if retirement is likely to occur in the near future, and if the marital estate includes sufficient assets to offset the award.” *Cohen v. Cohen*, 937 S.W.2d 823, 831 (Tenn. 1996) (citations omitted).

²“An employee has a ‘vested’ retirement right when the employee has completed the requisite term of employment necessary to be entitled to receive retirement benefits at some future time.” *Cohen*, 937 S.W.2d at 826 (emphasis added).

³“A ‘vested’ right *matures* when an employee reaches retirement age and elects to retire.” *Cohen*, 937 S.W.2d at 826 (emphasis added).

After concluding that their case was “particularly amenable⁴ to the use of the deferred distribution method for valuing and distributing” pension rights, the Court of Appeals remanded the Kendricks’ case to the trial court. *Id.* at 929. In so doing, this Court stated that Ms. Kendrick’s “interest should also be valued as near to the date of the final divorce hearing as possible and should be based on Sergeant Kendrick’s earliest possible vesting date and on his salary at the time of the divorce.” *Id.* at 929. In addition, the court gave the following instructions:

On remand, the trial court should first calculate the portion of Sergeant Kendrick’s pension that is marital property. (FN23) Next, the trial court should calculate Sergeant Kendrick’s retirement pay if he retired at his present rank at his earliest possible vesting date. Then, the trial court should determine the portion of the marital interest in the pension Ms. Kendrick should receive. (FN24) Finally, the trial court should enter an order setting out Ms. Kendrick’s share of Sergeant Kendrick’s retirement pay. (FN25)

Id. at 929.

The text of the footnotes referred to in this Court’s instructive paragraph quoted above is as follows: In Footnote 23, we explained that “[i]f Sergeant Kendrick’s pension vests after 20 years, then 52.5% of it would be marital property since the 10.5-year duration of the marriage is 52.5% of the 20 needed to earn a vested pension interest. If Sergeant Kendrick’s pension can vest after 15 years, then 70% of the pension would be marital property since 10.5 years is 70% of 15 years.” *Id.* at 930 n.23. This Court next asserted that “[a]n equal division is equitable unless the evidence requires otherwise” such that Ms. Kendrick’s share would be 26.25% ($\frac{1}{2}$ of 52.5%) if the pension vests after 20 years and 35% ($\frac{1}{2}$ of 70%) if the pension vests after 15 years. *Id.* at 930 n.24. In the final footnote, this Court states that “Ms. Kendrick’s share may be expressed in a fixed dollar amount or may be stated later as a percentage of Sergeant Kendrick’s actual retirement pay if and when he begins drawing it.” *Id.* at 930 n.25.

Subsequent to *Kendrick*, in *Cohen v. Cohen*, the Tennessee Supreme Court concluded, as did this Court in *Kendrick*, that the value of unvested retirement plans is marital property. 937 S.W.2d at 830. The court’s holding was based upon its determination that the statute’s definition of marital property includes retirement benefits, both vested and unvested. *Id.* at 827-30. After reaching this conclusion, the court discussed the different approaches to valuing benefits. *Id.* at 831. Regarding the deferred distribution or retained jurisdiction method, the court observed:

[T]he court may determine the formula for dividing the monthly benefit at the time of the decree, but delay the actual distribution until the benefits become payable. The

⁴The deferred distribution or retained jurisdiction method is advantageous because “it allows an equitable division without requiring present payment for a benefit not yet realized and potentially never obtained. Another advantage to the approach is that it equally apportions any risk of forfeiture.” *Cohen*, 937 S.W.2d at 831 (citations omitted).

marital property interest is often expressed as a fraction or a percentage of the employee spouse's monthly benefit. The percentage may be derived by dividing the number of months of the marriage during which the benefits accrued by the total number of months during which the retirement benefits accumulate before being paid. *Kendrick v. Kendrick*, 902 S.W.2d at 927 n.17.

Cohen, 937 S.W.2d at 831 (citations omitted).

The instant case raises an issue which, while related to the issues decided in *Kendrick* and *Cohen*, has not specifically been addressed by our courts: Whether the Wife can receive a portion of the Husband's retirement based upon the increased salary the Husband was receiving at the time of retirement as opposed to the lesser salary he was receiving at the time of divorce? In other words, as the Colorado Supreme Court articulated in a case addressing this very issue, "the question is whether a nonemployee spouse should be eligible to receive a percentage of the employee spouse's pension benefits on the basis of the rank held by the employee spouse on the date of dissolution or, alternatively, based on the rank held at the time the benefits are received." *In re Marriage of Hunt*, 909 P.2d 525, 532 (Colo. 1995).

Hunt involved the appeal of two lower court cases, both dealing with the division of military pension plans which were unvested and unmatured. *Id.* at 530. In both of those cases, the lower courts had employed the deferred distribution method of dividing retirement benefits, and, more importantly, like the trial judge in the case at bar, the *Hunt* lower courts had applied the "time rule formula" in order to apportion those marital benefits.

The "time rule" formula includes a marital fraction, sometimes referred to as a "coverture fraction," which determines the marital interest in the pensions. The marital fraction consists of the numerator which is the number of years (or months if more accurate) that the employee spouse has earned towards the pension during the marriage, over the denominator, which is the number of years (or months if more accurate) of total service towards the pension. The marital fraction is multiplied times the monthly benefit and divided in half (in order to divide the marital portion of the pension benefits).

Id. at 531. The court further pointed out that "[a]t the time the court establishes the percentage, the benefit is an unknown figure. Therefore, actual calculation of a dollar amount must await receipt of benefits." *Id.*

An issue in *Hunt* arose "because application of the 'time rule' formula [as articulated by the *Hunt* court] necessarily includes post-dissolution pension enhancements." *Id.* at 532. In a well-reasoned and thorough opinion, the Supreme Court of Colorado addressed this problem and expressly held:

[P]ost-dissolution increases in pension benefits are marital property when the trial court, in the sound exercise of its discretion, divides the pension under either the deferred distribution or reserve jurisdiction method. The “economic partnership” in the pension necessarily continues between the parties and post-dissolution increases (or decreases) of the pension are marital property unless the nonemployee spouse is paid the net present value of his or her share of the pension at the time of dissolution.

Id. The court articulated the “marital foundation theory” to support its conclusion that post-dissolution increases in pension benefits are marital property, not separate property.

Typically, there is commingling of effort undertaken during the marriage and after the marriage which together enhance the value of the future benefit. The employee spouse’s ability to enhance the future benefit after the marriage frequently builds on foundation work and efforts undertaken during the marriage. Hence, the theory underlying the “time rule” formula is called the “marital foundation” theory.

Id. at 534. Thus, despite the fact that these post-dissolution efforts may sometimes be related to the employee spouse’s effort, they should be treated like “passive increases such as cost-of-living increases or increases ascribable to pension plan changes in order to equitably apportion the risks of delay inherent in the deferred distribution and reserve jurisdiction method for distribution of benefits.” *Id.*

The time rule formula, which is articulated verbally above, appears in mathematical form as follows:

$$\frac{\text{Years of Service During Marriage}}{\text{Years of Total Service}} \times \frac{\text{Monthly Benefit}}{2}$$

Id. at 532. The court in *Hunt* made the important observation that the fairness of the time rule formula depends upon the marital fraction as well as *distribution of benefits as of the date of receipt rather than the date of eligibility*:

If the employee spouse continues to work beyond the date on which he or she is eligible to receive pension benefits, *and the trial court orders distribution as of the date of receipt of benefits rather than eligibility*, the marital fraction adequately compensates and rewards employee spouse for his or her continued efforts. This is so because the marital fraction is based on the length of the marriage during the years of employment (or military service) versus the employee spouse’s total employment (or military service). As the employee spouse’s total years of employment (or military

service) increase, the nonemployee spouse's share of the pension necessarily decreases.

Id. at 534-35 (emphasis added).

In adopting the marital foundation theory to support the time rule formula, the court rejected the “bright line” rule which equates post-dissolution pension benefit enhancements with post-dissolution earnings. *Id.* at 533.

[T]he “bright line” rule would require courts to attempt to parse out the “marital” portion of the post-dissolution enhancement from the “separate” portion, *i.e.*, that portion attributable solely to the efforts of the employee spouse and not related to the marriage whatsoever. Implementation of the “time rule” formula, in the first instance, accomplishes that goal and removes courts from the complicated, time-consuming, inefficient, and hopelessly flawed task of evaluating the enhancement and denominating the enhancement as either marital, separate, passive, or some combination thereof. . . . It is not appropriate for courts to delve into this sort of analysis for a number of reasons. Such inquiry would lead to widely divergent and inconsistent results, inject an element of fault into the property division, and enmesh the courts in the parties’ lives for many years.

If we were to adopt a “bright line” rule, courts also would be required to consider the weight of the years of employment towards enhancement of the pension. Some defined benefit plans are “frontloaded” or “backloaded,” *i.e.* “earlier or later years of employment receive extra weight in the formula.” Oldham § 7.10[5][c][iii] at 7-69. Therefore, depending on the plan, the earlier years of employment, occurring during the marriage, or the later years of employment, occurring post-dissolution, may have greater weight in contributing to the benefit. The “time rule” formula treats each year of employment equally. This unburdens trial courts from having to assess which years have more weight toward the accumulation of the benefit. Thereby, the “time rule” formula internalizes the notion that the highest salary realized by an employee is the product of all prior years and sensibly rejects the misconception that particular years of employment can be examined in a vacuum, like a snapshot in time, as under the “bright line” rule.

. . .

It is important to recognize that the “bright line” rule can lead to unfair and illogical results affecting not only the nonemployee spouse but also the employee spouse. For example, in addition to promotion, an employee spouse is subject to post-dissolution demotion. Demotion usually results in benefits that are lower than those the employee spouse would have been eligible to receive had he or she retired at the date of dissolution. Under the “bright line” approach, the employee spouse would still have to pay out a proportion of pension benefits that the nonemployee spouse would have been eligible to receive had the employee spouse retired on the date of

dissolution even though the anticipated amount was not forthcoming. We find that it is appropriate for the nonemployee spouse to share in the contingency of loss as well as the contingency of gain.

Hunt, 909 P.2d at 535-36.

The year after the Colorado Supreme Court decided the *Hunt* case, it issued another opinion addressing the division of pension benefits in *In Re Marriage of Kelm*, 912 P.2d 545 (Colo. 1996). In *Kelm*, the trial court had used the time rule formula and awarded the wife one half of nineteen thirtieths (19/30) of the husband's future retirement benefits. *Id.* at 548. The numerator of the marital fraction 19/30 represented the husband's nineteen years that he had worked during the marriage. The denominator was representative of the thirty years which would be his total service if he retired at the earliest possible date on which he would be eligible to receive maximum benefits as his testimony reflected was his plan. *Id.* at 549. The trial court fixed this "fraction in advance of husband's actual retirement date and reserved jurisdiction in the event husband took early retirement or was laid off due to cut backs or early buy-out of his retirement benefits." *Id.* The supreme court disagreed with the trial court in one regard finding that it should not have fixed the denominator of the marital fraction at thirty. *Id.* at 550.

If husband opts to continue working for a period of time beyond the thirty-year mark, the denominator of the coverture fraction should reflect husband's increased period of employment. Ultimately, wife's share of the pension under the coverture fraction should decrease in proportion to husband's continued efforts in order to properly apportion the increased benefit. Similarly, if husband works less than thirty years, wife's share in the resulting decreased benefits will increase correspondingly because the denominator will be less than thirty.

...

Leaving the denominator undetermined until the receipt of benefits eliminates the need for the trial court to "reserve jurisdiction" in the event husband takes early retirement or is subject to a reduction in force or early buy-out of his retirement benefits. In fact, the trial court's attempt to address future contingencies, which would shorten husband's period of employment, would have been unnecessary had the trial court correctly applied the deferred distribution method in the first instance.

Id. at 550-51.

Initially, we hold, as did the Colorado court, that post-dissolution increases in pension benefits are to be used in calculating the benefits payable to the non-employee spouse at the time of the retirement of the employee spouse when the trial court, in its discretion, employs the retained

jurisdiction or deferred distribution method to value and distribute pensions.⁵ Our conclusion is based on the marital foundation theory which recognizes that “[t]he employee spouse’s ability to enhance the future benefit after the marriage frequently builds on foundation work and efforts undertaken during the marriage.” *Hunt*, 909 P.2d at 534. Furthermore, we think that the formula for the division of pension benefits as articulated and developed by the Colorado Supreme Court in *Hunt* and *Kelm* most equitably apportions marital property in accordance with the Tennessee Code. *See* Tenn. Code Ann. § 36-4-121(a)(1) (1996). Thus, we apply the time rule formula in which the numerator of the marital fraction is the number of years (or months if more accurate) that the employee spouse has earned toward the retirement pension during the marriage and the denominator is the number of years (or months if more accurate) of the employee spouse’s total service toward the pension at the time that he or she retires. In addition, we hold that the non-employee spouse should receive a portion, usually half, of the amount which is the marital fraction multiplied times the employee spouse’s actual monthly retirement benefit.

In holding that the non-employee spouse should receive a portion of the employee spouse’s actual retirement, we must acknowledge the language in *Kendrick* wherein this Court asserts that the non-employee spouse’s retirement interest should be based on the employee spouse’s salary at the time of divorce.⁶ First, we note that in the same opinion, this Court also states that “Ms. Kendrick’s share may be expressed in a fixed dollar amount or may be stated later as a percentage of Sergeant Kendrick’s *actual retirement pay* if and when he begins drawing it.” *Kendrick*, 902 S.W.2d at 930 n.25 (emphasis added). *Kendrick* was not expressly addressing the issue of post-dissolution enhancements in retirement benefits. Thus, we conclude that *Kendrick*, by its own language, left open the possibility that a non-employee’s percent of his or her spouse’s retirement benefit be of the actual payments made after retirement. Indeed in *Cohen*, wherein the Tennessee Supreme Court adopted much of *Kendrick*’s holding that non-vested retirement benefits are marital property, the court’s language indicated that the non-employee spouse should receive a portion of actual retirement payments. The court stated that “[t]he marital property interest is often expressed as a fraction or a percentage of the employee spouse’s *monthly benefit*” which must mean the actual monthly benefit. *Cohen*, 937 S.W.2d at 831 (emphasis added).

The other issue which is unclear in prior case law involves the denominator of the marital fraction. We hold that the denominator is the number of total years or total months that the employee spouse has served toward his or her pension upon his or her retirement. In *Kendrick*, this Court instructed the lower court that the wife’s interest should be based on the husband’s “earliest possible vesting date.” *Kendrick*, 902 S.W.2d at 929. The Court then stated in a footnote that “[i]f Sergeant Kendrick’s pension vests after 20 years, then 52.5% of it would be marital property since the

⁵While the Colorado Court classifies these post-divorce enhancements as “marital property,” we think such classification is unnecessary. The court has simply divided the marital property which existed at the time of divorce. The enhancements follow the assigned marital property as interest follows principle. Only the percentage of the retirement benefit changes with the increasing denominator.

⁶This provision of *Kendrick* considered in isolation is consistent with the “bright line,” rule in its strictest form as exemplified by *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983).

10.5-year duration of the marriage is 52.5% of the 20 needed to earn a vested pension interest. If Sergeant Kendrick's pension can vest after 15 years, then 70% of the pension would be marital property since 10.5 years is 70% of 15 years." *Id.* at 930 n.23. However, in the same opinion, the Court stated that "the denominator is the *total* number of years or months during which the pension benefits were accumulated before being paid." *Id.* at 930 n.17 (emphasis added). The Tennessee Supreme Court was less ambiguous in *Cohen* wherein it stated, "[t]he percentage [expressing the marital property interest] may be derived by dividing the number of months of the marriage during which the benefits accrued by the *total* number of months during which the retirement benefits accumulate before being paid." *Cohen*, 937 S.W.2d at 831 (emphasis added).

After the decisions in *Kendrick* and *Cohen*, the Western Section of this Court decided *Cozart v. Cozart*, 1999 WL 669225 (Tenn. Ct. App. Aug. 27, 1999). In that case, the insurance agent/husband participated in a "deferred compensation incentive" program in which credits were earned for each year of service. At the time of the divorce, the Husband had accrued 133,423 DCI credits with monetary equivalent of \$1.00 per credit or \$133,423.00. In that case the DCI credits were thus capable of being valued at the time of the divorce and the present value of the Husband's accrued credits at that time was \$99,707.00. Using the present value method and dividing the DCI credits the Wife would have received \$49,853.50 in cash. The court, however, found the total marital estate was insufficient to make an offsetting award with other marital property and the Husband could not afford to pay the present cash value of the Wife's interest in cash or in periodic installments based on his income and expenses. The court chose therefore, to defer payment of the Wife's interest and freeze the marital DCI credits at 133,423. The Court then devised a formula similar to the "time rule" formula of *Hunt* and *Kelm*. For example the court assumed that the Husband's total DCI credits at the time of his retirement would be 250,000. The court then divided 133,423 by 250,000 yielding a product of .53369. The Wife's interest under this deferred distribution method would be fifty percent of the total distribution at retirement based on a marital factor of 133,423, resulting in payment to her at the time of Husband's retirement of 26.6845 percent of his total 250,000 DCI credits. In *Cozart*, the court was dealing with DCI credits of predetermined equal value and not the kind of value enhancement inherent in the retirement benefits in the case at bar wherein the total benefit is calculated upon the average of the final three years of service prior to retirement. Under the facts of this case, the average salary for those three years immediately preceding retirement considerably outweighs the average salary of the Husband in the three years immediately preceding termination of the marriage. *Cozart* does not resolve the problem when post-divorce enhancements unbalance static unit values with the result that post-divorce pre-retirement months or years weigh unequally when balanced against the marital years under the retirement plan.

Tennessee Code Annotated section 36-4-121(b)(1)(A) provides in pertinent part that "marital property" shall be "... valued as of a date as near as reasonably possible to the final divorce hearing date." Section 14-10-113(5) of the Colorado Code provides "for purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree." The Tennessee and Colorado statute requirements are essentially the same.

In clarifying this issue, we note that, in order to be fair to both the employee spouse and the non-employee spouse, the denominator should be the total amount of time that the employee spouse worked before retiring. This way, as the employee spouse continues to work after that time when he is eligible to retire, the denominator of the marital fraction increases, and consequently the non-employee spouse's share in the retirement benefit decreases. Thus, the employee spouse is rewarded for his continued work effort subsequent to eligibility for retirement by receiving a larger share of the retirement. However, if the employee spouse retires early, the non-employee spouse will have a greater share in a retirement pension which will most likely be smaller. Thus, the non-employee spouse is protected in part from the employee spouse's decision to forgo part of his retirement by retiring early. See *Hunt*, 909 P.2d at 534-35; *Kelm*, 912 P.2d at 550-51.

CONCLUSION

In trying to deal with the distribution of pension benefits we must not lose sight of the fact that each case addresses itself in the first instance to the trial court and that "the choice of valuation method is a discretionary one, that depends on the facts of the case." *Kendrick*, 902 S.W.2d 918, 927 (Tenn. Ct. App. 1994). The "present value" method is still a viable option in valuation depending upon the facts of the particular case and the discretion vested in the trial court. The "retained jurisdiction or deferred distribution" method is still a viable option in valuation when dealing with static values as in *Cozart*. The "time rule" formula based as it is upon the "marital foundation theory" articulated by the Supreme Court of Colorado in *Hunt* and *Kelm* and applied herein is but another option available under the retained jurisdiction or deferred distribution method in the first instance to the trial court in those cases where years or months of service during the marriage are rendered of unequal value to years or months post-divorce in the formula for distribution at the time of actual retirement.

Division of pension benefits of an employee spouse, particularly at termination of a relatively long-term marriage where the employee spouse continues after-divorce employment for a significant period of time, has presented significant problems to the courts of Tennessee, and elsewhere, as is evidenced by *Kendrick*, 902 S.W.2d 918 and *Cohen*, 937 S.W.2d 823. The trial court initially has a number of alternative methods of dividing pension rights including the present value method and the retained jurisdiction or deferred distribution method. *Kendrick*, 902 S.W.2d at 927. The retained jurisdiction or deferred distribution rule is advantageous in that "... it allows an equitable division without requiring present payment for a benefit not yet realized and potentially never obtained. Another advantage to the approach is that it equally apportions any risk of forfeiture." *Cohen*, 937 S.W.2d at 831 (citations omitted). Our application herein of the "time rule formula" articulated by the Supreme Court of Colorado in *Hunt*, 909 P.2d 525, and *Kelm*, 912 P.2d 545, is but a naturally flowing progression of *Cohen*. Neither employee spouse nor nonemployee spouse will receive any money at all until the employee spouse retires, an event which is by no means certain ever to happen. The employee spouse may die before retirement eligibility or choose to work past retirement eligibility until he or she "dies in harness." These same contingencies and uncertainties exist in the retained jurisdiction or deferred distribution method, however, with or without the "time rule formula" articulated in *Hunt* and *Kelm*.

The fairness and equity of the “time rule formula” stem from the static numerator of the marriage years compared to the ever expanding denominator of the post marriage years so that the percentage of the actual retirement income assigned to the nonemployee spouse continues to diminish with each year added to the denominator by the continued post divorce employment of the employee spouse prior to his actual retirement. The trial judge, without articulation, applied the “time rule formula” in this case. When the decree of the trial judge is considered in light of the “time rule formula” there is no ambiguity in the MDA or the judgment and the trial court correctly disallowed parol evidence. By applying this rule, so well articulated by the Supreme Court of Colorado in *Hunt* and *Kelm*, we affirm the action of the trial judge.

Costs of this case are assessed against the appellant and the case is remanded to the trial court for such further proceedings as may be necessary.

WILLIAM B. CAIN, JUDGE